

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiff Jose Buenoroastro (Buenoroastro) has filed this suit in pro per against John Potter (Potter) alleging retaliation and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq (Title VII) and age discrimination in violation of the Age Discrimination in Employment Act, 29 USC § 621 et seq (the ADEA). Doc #1 (Compl). Potter moves for summary judgment on all claims. Doc #28 (MSJ). Buenoroastro opposes. Doc #39 (Opp). Based upon the parties' memoranda and the applicable federal law, the court GRANTS Potter's motion.

I

The following relevant facts are not in dispute.

Buenoroostro began his employment with the United States Postal Service (USPS) in 1995 as a clerk and mail handler. On March 13, 1999, he was elevated to a part-time flexible letter carrier for a 90-day probationary period at the Santa Rosa post office. Buenoroostro's supervisor at the Santa Rosa post office, Joe Machado, terminated Buenoroostro on May 31, 1999, for unacceptable work performance. On August 16, 1999, Buenoroostro filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that Machado terminated him on the basis of age. Doc #34 (Rutter Decl), Ex A8 (EEOC Compl) at 1. Buenoroostro's EEOC complaint appears to have been based on direct and circumstantial evidence. As direct evidence, Buenoroostro claimed that in September 1998, when he first applied for a position as a letter carrier, Terri Thomas, a USPS supervisor, informed Buenoroostro that he was "too old for a carrier position." Id at A7 (Buen Stat) at 1. As circumstantial evidence, Buenoroostro claims that three younger letter carriers who were also on probationary periods were hired full-time by USPS. Id.

On May 8, 2001, Buenoroostro and the USPS entered into a negotiated settlement agreement whereby Buenoroostro withdrew his EEOC complaint and the USPS agreed to rehire/reinstate him at a different post office -- the Petaluma post office -- as a letter carrier subject to a new 90-day probationary period. Id at A1 (EEOC Sett Notice).

Buenoroostro began his second probationary period as a part-time letter carrier at the Petaluma post office on May 19,

1 2001. His primary supervisors, Juli LoDolce and Todd Matthews,
2 provided Buenorostro with a normal five-day training period with an
3 experienced letter carrier, Dave Sartori. Doc #29 (Matthews Decl)
4 at 2.

5 According to Matthews and LoDolce, it soon became
6 apparent that Buenorostro was not satisfactorily performing his
7 duties as a part-time flexible letter carrier. Buenorostro would
8 take double and sometimes triple the amount of expected time to
9 deliver mail. Doc #32 (LoDolce Decl) at 2; Mattehws Decl at 3. On
10 at least one occasion, Buenorostro did not call in by 3:00 pm as he
11 had been instructed to do if he was in danger of not completing his
12 delivery route. Matthews Decl at 3. Consequently, Matthews was
13 forced to send out another letter carrier to help Buenorostro
14 finish his route. Id. Matthews asserts that several times he was
15 unable to contact Buenorostro and would have to go out looking for
16 Buenorostro on his route. Matthews asserts that, on more than
17 occasion, Buenorostro failed to deliver the mail accurately,
18 leading to at least one customer complaint. Id. On June 18, 2001,
19 Matthews gave Buenorostro his 30-day job evaluation. In the
20 categories of work quantity, work quality and work methods,
21 Buenorostro received an "unacceptable" rating. In the categories
22 of work relations and personal conduct, Buenorostro received a
23 "satisfactory" rating. Id at 4.

24 Buenorostro's performance did not improve; it got worse.
25 Specifically, on July 11, 2001, Buenorostro was observed engaging
26 in unsafe driving practices. Id at 3, Ex A. Attempting to
27 pinpoint Buenorostro's problems, Matthews and LoDolce had him
28 shadowed by an experienced letter carrier, Luis Molina, for two

1 days to observe and inform Buenoroostro regarding delivery errors
2 and suggest how to increase efficiency. Matthews Decl at 2' Doc
3 #31 (Molina Decl) at 2. Despite Molina's observation that
4 Buenoroostro was a nice, hard-working individual, Molina concluded
5 that Buenoroostro "just didn't have it in him" to be a letter
6 carrier based upon his "significant and repeated trouble delivering
7 the mail in a timely manner * * *." Id. Molina characterizes
8 Buenoroostro's errors as "overwhelming and egregious." Id.

9 On July 17, 2001, Buenoroostro received his 60-day
10 evaluation from Matthews; the ratings were identical to the 30-day
11 ratings. Matthews Decl, Ex B. On August 1, 2001, Matthews
12 informed Buenoroostro that he was being terminated for failing to
13 meet the requirements of a letter carrier position. Id, Ex C (Term
14 Letter). Matthews cited Buenoroostro's (1) failure to operate a
15 postal vehicle in a safe manner, (2) failure to phone at 3:00 pm if
16 in jeopardy of not meeting committed times and (3) failure to
17 deliver mail accurately. Id.

18 On October 2, 2001, Buenoroostro filed an EEOC complaint
19 alleging that he was terminated from the Petaluma post office based
20 on his age, national origin and in retaliation for his prior EEOC
21 complaint. An EEOC ALJ concluded that the USPS did not
22 discriminate against Buenoroostro on any of these grounds; this
23 decision was affirmed on September 11, 2003, and reconsideration
24 was denied on December 11, 2003. On March 9, 2004, Buenoroostro
25 filed the current complaint in this court alleging age, national
26 origin and retaliation discrimination against USPS arising from his
27 termination from the Petaluma post office. Doc #1 (Compl).

28 Potter currently moves for summary judgment in his favor

1 on all of Buenoroostro's claims, asserting that no genuine issue of
2 material fact exists regarding the basis for Buenoroostro's
3 termination from the Petaluma post office. MSJ at 14. Buenoroostro
4 opposes. Doc #39.

6 II

7 In reviewing a summary judgment motion, the court must
8 determine whether genuine issues of material fact exist, resolving
9 any doubt in favor of the party opposing the motion. "[S]ummary
10 judgment will not lie if the dispute about a material fact is
11 'genuine,' that is, if the evidence is such that a reasonable jury
12 could return a verdict for the nonmoving party." Anderson v
13 Liberty Lobby, 477 US 242, 248 (1986). "Only disputes over facts
14 that might affect the outcome of the suit under the governing law
15 will properly preclude the entry of summary judgment." Id. And
16 the burden of establishing the absence of a genuine issue of
17 material fact lies with the moving party. Celotex Corp v Catrett,
18 477 US 317, 322-23 (1986). Summary judgment is granted only if the
19 moving party is entitled to judgment as a matter of law. FRCP
20 56(c).

21 The nonmoving party may not simply rely on the pleadings,
22 however, but must produce significant probative evidence, by
23 affidavit or as otherwise provided in FRCP 56, supporting its claim
24 that a genuine issue of material fact exists. TW Elec Serv v
25 Pacific Elec Contractors Assn, 809 F2d 626, 630 (9th Cir 1987).
26 The evidence presented by the nonmoving party "is to be believed,
27 and all justifiable inferences are to be drawn in his favor."
28 Anderson, 477 US at 255. "[T]he judge's function is not himself to

1 weigh the evidence and determine the truth of the matter but to
2 determine whether there is a genuine issue for trial." Id at 249.

3 The evidence presented by both parties must be
4 admissible. FRCP 56(e). Conclusory, speculative testimony in
5 affidavits and moving papers is insufficient to raise genuine
6 issues of fact and defeat summary judgment. Thornhill Publishing
7 Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979).

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9 III

10 The court addresses first Buenorostro's claims of age
11 discrimination and national origin discrimination.

12
13 A

14 *ADEA Claim*

15 Although Buenorostro's complaint alleges age
16 discrimination in violation of the ADEA, he conceded in his
17 deposition that no one at the Peataluma post office discriminated
18 against him based on his age. Doc #33 (Olsen Decl), Buenorostro
19 Depo (11/24/04) at 30:22-34:4. The following excerpts of the
20 deposition transcript will illustrate Buenorostro's concession:

21 Q: Did Todd Matthews ever tell you [that] you
22 were too old to be a letter carrier?

23 A: No

24 Q: Did Todd Matthews ever raise any concerns
about your age?

25 A: No. On the contrary, he was a very good
26 friend of mine, and helped me a lot at work.

27 * * *

28 Q: * * *. Did you ever tell Todd Matthews how
old you were?

1 A: No.

2 Q: And did you ever hear him make any comments
3 at all about your age?

4 A: No.

5 Q: How about any other supervisor at the
6 Petaluma Post Office, did they ever make any
7 comments about your age?

8 A: No. We all had a really good
9 relationship.

10 Q: Okay. How about Coper Dulin, did she ever
11 make any comments about your age?

12 A: No.

13 Q: So why do you believe that you were
14 discriminated against on the basis of your
15 age?

16 A: Because of my age, that is what Terr[i]
17 Thomas did. However, the reason I was
18 terminated -- the reason I was terminated in
19 Petaluma was because of my previous complaint.
20 Because they didn't have any other reason.

21 Q: Okay, so correct me if I am wrong. You're
22 saying that Terr[i] Thomas, in Santa Rosa,
23 discriminated against you on the basis of your
24 age?

25 A: Yes.

26 Q: And that you were discriminated against in
27 Petaluma because of your prior EEO activity?

28 A: That's right

Q: Did anyone in Petaluma discriminate
against you on the basis of your age?

A: No. No one.

Tr at 31:6-14, 32:24-34:4 (emphasis added).

Buenoroostro clearly testified that the reason (singular)
he was terminated from the Petaluma post office was his previous
EEOC complaint (i e, retaliation discrimination). He cannot
presently contradict this testimony to survive summary judgment by

1 arguing that he was discriminated against based on his age. As
2 this court has stated, "[i]f a party who has been examined at
3 length on deposition could raise an issue of fact simply by
4 submitting an affidavit contradicting his own prior testimony, this
5 would greatly diminish the utility of summary judgment as a
6 procedure for screening out sham issues of fact.'" Martinez v
7 Marin Sanitary Service, 349 F Supp 2d 1234, 1242 (N D Cal 2004)
8 (Walker, J) (quoting Kennedy v Allied Mutual Ins Co, 952 F2d 262,
9 266 (9th Cir 1991)). Buenoroostro offers no explanation at all,
10 much less a sufficient explanation for this contradiction. Id.

11 Moreover, Buenoroostro's original EEOC complaint was
12 premised on Terri Thomas' alleged statements in 1998 at the Santa
13 Rosa post office that Buenoroostro was "too old" to be a letter
14 carrier, Rutter Decl at A7, and thus Buenoroostro is barred from
15 reasserting this claim pursuant to the settlement agreement he
16 entered into with the USPS on May 8, 2001. Under the terms of the
17 settlement agreement, Buenoroostro, in exchange for being
18 rehired/reinstated with USPS, agreed "not to institute a lawsuit
19 under Title VII * * * or any other state or Federal law or
20 regulation regarding these issues." Rutter Decl at A1 (EEOC Sett
21 Notice) at 2. Because Buenoroostro's first EEOC complaint was
22 premised on Thomas' alleged statements, Buenoroostro is now barred
23 from premising his current age discrimination claim on this issue.

24 Accordingly, Potter is entitled to summary judgment on
25 Buenoroostro's ADEA claim.

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B

National Origin Claim

Buenoroostro's national origin claim is similarly flawed. Aside from stating that the only reason for his termination from the Petaluma post office was his prior EEOC complaint, Buenoroostro testified to the following regarding his national origin claim:

Q: Okay, so I don't want to beat a dead horse. My understanding is that - may understanding is that your claim is that you were discriminated against for your prior EEO activity.

A: Yes.

Q: But do you believe that anyone in the Petaluma facility, not Santa Rosa, but in the Petaluma facility, do you believe that anyone discriminated against you in Petaluma on the basis of your national origin?

A: No.

Buenoroostro Depo (11/24/04) at 36:9-18 (emphasis added).

Buenoroostro now claims that Todd Matthews and Copper Dulin at the Petaluma post office discriminated against him on the basis of his national origin. Doc #39 at 12. Again, Buenoroostro offers no explanation for this contradiction and thus he fails to raise a genuine issue of material fact sufficient to survive summary judgment on his national origin claim. Martinez, 349 F Supp 2d at 1242.

IV

Unlike his ADEA claim and national origin Title VII claim, Buenoroostro has consistently maintained that he was terminated from the Petaluma post office in retaliation for filing

1 the original EEOC complaint stemming from his termination at the
2 Santa Rosa post office.

3 To establish a prima facie case of retaliation under
4 Title VII, Buenorostro "must demonstrate that (1) [he] had engaged
5 in a protected activity; (2) [he] was thereafter subject by his
6 employer to an adverse employment action; and (3) a causal link
7 existed between the protected activity and the adverse employment
8 action." Porter v California Dep't of Corrections, 383 F3d 1018,
9 1029 (9th Cir 2004) (citing Ray v Henderson, 217 F3d 1234, 1239-40
10 (9th Cir 2000)). If Buenorostro makes out a prima facie case, the
11 burden shifts to Potter to articulate a legitimate,
12 nondiscriminatory reason for terminating Buenorostro. Id. If
13 Potter sets forth such a reason, Buenorostro "bears the ultimate
14 burden of submitting evidence indicating that [Potter's] proffered
15 reason is merely a pretext for a retaliatory motive." Id. As to
16 circumstantial evidence, the Ninth Circuit instructs that a
17 plaintiff "must proffer 'substantial' and 'specific' evidence of
18 pretext to overcome [a defendant's] motion for summary judgment."
19 Stegall v Citadel Broadcasting Co, 350 F3d 1061, 1066 (9th Cir
20 2003) (quoting Manatt v Bank of America, 339 F3d 792, 801 (9th Cir
21 2003)).

22 Potter does not dispute that Buenorostro engaged in a
23 protected activity in filing the original EEOC complaint after his
24 termination from the Santa Rosa post office. MSJ at 12. Moreover,
25 Potter concedes that Buenorostro was subject to an adverse
26 employment action: He was terminated. Id. Potter argues,
27 however, that Buenorostro has failed to demonstrate a causal link
28 between the prior EEOC complaint and his termination from the

1 Petaluma post office. Id. The court agrees.

2 Buenorostro himself admits that he did not tell Matthews
3 about his original EEOC complaint until after Matthews had given
4 Buenorostro his negative 30- and 60-day evaluations. Opp at 14.
5 Matthews asserts that he did not know of Buenorostro's EEOC
6 complaint prior to Buenorostro telling him about it, Doc #29 (Matt
7 Decl) at 4, and Buenorostro offers no evidence to the contrary.
8 Accordingly, the 30- and 60-day evaluations describing
9 Buenorostro's work performance as unacceptable could not have been
10 the product of a retaliatory motive; Matthews did not even know
11 about the prior EEOC complaint.

12 Assuming arguendo that Buenorostro has made out a prima
13 facie case of retaliation (which he has not), Potter has
14 articulated a legitimate, nondiscriminatory reason for terminating
15 Buenorostro: His unacceptable job performance (e g, unsafe
16 driving, mistakes in delivering mail, untimely mail delivery).
17 Buenorostro has failed to submit specific and substantial evidence
18 indicating that this reason is a pretext for retaliation. Rather,
19 Buenorostro conclusorily states that he was "set-up to fail"
20 because he was "given too much mail and was unable to finish the
21 route" on time. Opp at 6, 15. Buenorostro provides no evidence in
22 support of this argument, much less specific and substantial
23 evidence; he simply offers his conclusions and speculations.
24 Conclusory and speculative testimony is insufficient to raise
25 genuine issues of fact and defeat summary judgment. Thornhill
26 Publishing Co, 594 F2d at 738.

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V

In sum, the court GRANTS Potter's motion for summary judgment (Doc #28). The clerk is directed to CLOSE the file and TERMINATE all motions.

SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge